Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

TOWN OF SURFSIDE,

Petitioner,

v.

MIDRASH SEPHARDI, INC. and
YOUNG ISRAEL OF BAL HARBOUR, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc, *et seq.* ("RLUIPA"), unconstitutionally usurp the judicial function by substantively altering equal protection principles as applied to local zoning laws?

II.

Does the "equal terms" provision of RLUIPA violate the Establishment Clause by giving special deference to religious land uses and by exempting them from neutral laws of general application?

III.

Are plaintiffs required to meet the substantial burden test under Section (a) of RLUIPA as a threshold jurisdictional matter before an "equal terms" violation under Section 2(b) can be found?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	6
Reasons for Granting *Certiorari*	10
I. The Decision Below Presents an Important But Unanswered Federal Question Regarding Congress's Constitutional Authority to Federalize Local Land Use and Zoning Laws, and Enact Legislation That Substantively Alters, or Abrogates, Established Equal Protection and Free Exercise Laws.	10
A. RLUIPA substantively alters established equal protection laws and is unconstitutional.	10

Contents

Page

B. Congress lacked the power to enact RLUIPA. 12

C. RLUIPA violates the Establishment Clause. 18

D. The view that a plaintiff can prove an "equal terms" violation without proving a substantial burden is contrary to the express provisions of RLUIPA and free exercise law. 19

II. Conflict Between the Sixth and Eleventh Circuits on the Constitutionality of RLUIPA Warrants *Certiorari* Review by this Court. ... 21

Conclusion 22

TABLE OF CITED AUTHORITIES

Page

Cases:

American Communications Ass'n, C.I.O., v. Douds,
339 U.S. 382 (1950) 11

Board of Trustees of the University of Alabama v. Garrett,
531 U.S. 356 (2001) 14

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) 11, 12

City of Boerne v. Flores,
521 U.S. 507 (1997) ..... *passim*

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 9, 11

Civil Liberties for Urban Believers v. City of Chicago,
342 F.3d 752 (7th Cir. 2003) 17

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville,
338 U.S. 805 (1949) 11, 19

Cutter v. Wilkinson,
349 F.3d 257 (6th Cir. 2003)
(Case No. 03-9877) 21

Cited Authorities

Page

Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 11, 21

FERC v. Mississippi, 456 U.S. 742 (1982) 13

Hess v. Port Authority Trans-Hudson Corporation, 513 U.S. 30 (1994) 13

Intern. Church of the Foursquare Gospel v. City of Chicago Heights, 955 F. Supp. 878 (N.D. Ill. 1996) 17

Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) 15

Madison v. Riter, 355 F.3d 310 (4th Cir. 2003) 21

Messiah Baptist Church v. County of Jefferson, 859 F.2d 820 (10th Cir. 1988) 17

New York v. United States, 505 U.S. 144 (1992) 18

Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakeland, 699 F.2d 303 (9th Cir. 1983) 17

Cited Authorities

Page

Printz v. United States,
521 U.S. 898 (1997) 18

Wallace v. Jaffree,
472 U.S. 38 (1985) 18

Warth v. Seldin,
422 U.S. 490 (1975) 13

Other Authority:

Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311 (2003) 16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Filed April 21, 2004 ..... 1a

Appendix B — Final Judgment Of The United States District Court For The Southern District Of Florida Dated July 8, 2003 ..... 56a

Appendix C — Order Pursuant To Rule 54(b) Directing Entry Of Final Judgment As To All Of The Plaintiffs' Claims And Defendant's Counterclaim For Declaratory And Injunctive Relief Of The United States District Court For The Southern District Of Florida Dated July 8, 2003 ..... 58a

Appendix D — Order Granting Injunctive Relief And Entering Permanent Injunction Against Plaintiffs Of The United States District Court For The Southern District Of Florida Dated July 8, 2003 ..... 60a

Appendix E — Second Amended Order And Amended Order On Motion For Reconsideration Of The United States District Court For The Southern District Of Florida Dated May 19, 2003 ..... 64a

Appendices

Page

Appendix F — Order On Motion For Reconsideration Of The United States District Court For The Southern District Of Florida Dated May 13, 2003 ..... 81a

Appendix G — Order On Motion For Summary Judgment Of The United States District Court For The Southern District Of Florida Dated January 3, 2003 ..... 94a

Appendix H — Order On Motions For Summary Judgment Of The United States District Court For The Southern District Of Florida Dated January 2, 2003 ..... 101a

Appendix I — Order Re: Final Summary Judgment Of The United States District Court For The Southern District Of Florida Filed July 17, 2000 ..... 127a

Appendix J — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed April 21, 2004 .... 162a

OPINIONS BELOW

The opinion of the court of appeals is reported at *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004). It is reproduced in the appendix at App. A-1a. The orders of the district court are unreported and are reproduced in the appendix at App. D-60a, E-64a, F-81a, G-94a, H-101a, I-127a.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion on April 21, 2004. App. A-1a. Rehearing was denied on July 13, 2004. App. J-162a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Article I, Section 8, Clause 3 (Commerce Clause):

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

First Amendment (Establishment Clause; Freedom of Religion, and Speech):

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . or the right of the people peaceably to assemble. . . .

Tenth Amendment (Reservation of Powers to States):

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment, § 1 (Equal Protection Clause):

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment, § 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

RLUIPA, 42 U.S.C.A. § 2000cc:

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which —

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability;

or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that —

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA, 42 U.S.C.A. § 2000cc-2(a) and (b):

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

* * * *

STATEMENT OF THE CASE

The Town of Surfside, Florida, is a small, one square-mile town with 4300 residents. Its business district comprises only two blocks. The purpose of the business district is "to provide for retail shopping and personal retail service needs of the Town's residents and tourists." App. A-4a, I-47a. The Town Code mirrors the Town's Comprehensive Plan's objectives to invigorate the business district and to create a strong tax base through its retail and tourist districts in light of a sagging retail environment. App. I-159a.

Surfside's Code has not allowed churches and synagogues in the business district for over forty years, but allows them in Surfside's centrally-located and larger multi-family residential zoning district (RD-1). App. I-129a, I-151a. The business district also excludes all other non-commercial assemblies of a "public or semi-public character," such as educational or philanthropic institutions, public schools, libraries, museums, auditoriums, public and governmental buildings, homeless and animal shelters, food banks, campgrounds, public parks, and playgrounds. App. A-27a, I-47a. Based on its business district goal of serving its residents' shopping and service needs, Surfside categorizes religious institutions with those secular uses. Private clubs are permitted in the business district, but none are located there.

Respondents Midrash Sephardi, Inc. and Young Israel of Bal Harbour, Inc. are two Orthodox Jewish synagogues. In 1997, Midrash subleased space on the second floor of an office building in Surfside's business district to operate its synagogue. Young Israel opened its synagogue in 1999 in Surfside's tourist district, but since November 2000 has been

sharing the business district space occupied by Midrash. App. A-6a, I-128a. The majority of the synagogues' members reside outside of Surfside. App. I-130a. The synagogues did not seek to lease property in the permitted and centrally-located, RD-1 district, contending that their members who live in adjoining towns would have to walk too far to attend services there. *Id.*

Midrash and Young Israel sued Surfside in 1999, alleging violations of the First and Fourteenth Amendments, Florida's Religious Freedom Restoration Act, § 761.01, *et seq.*, Fla. Stat., and (after its enactment in September 2000) the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The graveman of the synagogues' pre-RLUIPA position was that locating in the business district placed them closer to the adjoining towns of Bal Harbour and Bay Harbor Islands, making it easier for their congregants from those towns to walk to services, since they claimed walking to the multi-family district constituted a substantial burden on their congregants' free exercise rights. App. A-2a, A-9a.

The district court granted summary judgment in favor of Surfside on all counts, finding that the synagogues' constitutional and statutory claims were without merit, that its members were not substantially burdened by the Code, and that Surfside's unrebutted expert evidence established that it had a compelling interest in maintaining the commercial nature of the business district to generate revenue and to serve the Town's citizens' retail and service needs. App. D-60a, E-64a, F-81a, G-94a, H-101a, I-127a. The district court also granted summary judgment on Surfside's counterclaim for injunctive and declaratory relief, and entered a permanent injunction against the synagogues, enjoining them from continuing to operate at the present

location in violation of the Code. App. C-58a, D-60a. The district court also found that there was no RLUIPA violation because the equal protection analysis that was embodied in RLUIPA's "equal terms" provision did not support any claim of discrimination against the synagogues. App. E-68a-80a.

The Eleventh Circuit Court of Appeals reversed the judgment, sustaining only the synagogues' "equal terms" challenge under Section (b)(1) of RLUIPA — which provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). App. A-24a, 55a.

According to the circuit court, Surfside must allow religious institutions to locate anywhere any other non-religious "assemblies" or "institutions" may be located, which the court broadly defined as "[a] group of persons organized and united for some common purpose." App. A-28a. Since it found that private clubs fit the definition of an "assembly," the circuit court held that Surfside had to allow churches and synagogues anywhere that private clubs were allowed, including the business district, notwithstanding the fact that no clubs exist there. App. A-29a.

The circuit court also found that Surfside's Code did not substantially burden the synagogues' religious rights (App. A-21a-24a), but it ruled that RLUIPA does not require an initial finding that a zoning law "substantially burdens" a religious exercise. App. A-25a-26a. The "substantial burden" test is set forth in the "General rule" under Section (a) of RLUIPA. Instead, the circuit court interpreted Section (b)(1)'s

"equal terms" provision as imposing strict liability, viewing that provision as negating any requirement that a plaintiff prove any burden on religious rights. The court wrote: "§ (b)(1) renders a municipality strictly liable for its violation, rendering a discriminatory land use regulation *per se* unlawful without regard to any justifications supplied by the zoning authority." App. A-25a.

The court also rejected use of the rational basis standard of *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), which is typically used in equal protection cases when two "similarly-situated" land uses are treated differently. *Id.* Its decision interpreted Section (b)(1) as requiring only an analysis of whether two uses fall into the "natural perimeter" of "an assembly or institution," and not whether the two land uses are similar to each other in relevant zoning aspects. App. A-27a-28a.

Finally, the circuit court ruled that RLUIPA did not violate the Establishment Clause by giving special deference to religious uses over non-religious uses. App. A-48a-53a. It also ruled that Congress did not exceed its authority under the Tenth Amendment and Section 5 of the Fourteenth Amendment by enacting RLUIPA. App. A-42a-48a, 53a-55a. Surfside unsuccessfully sought rehearing and rehearing *en banc*. App. J-162a.

REASONS FOR GRANTING *CERTIORARI*

I. The Decision Below Presents an Important But Unanswered Federal Question Regarding Congress's Constitutional Authority to Federalize Local Land Use and Zoning Laws, and Enact Legislation That Substantively Alters, or Abrogates, Established Equal Protection and Free Exercise Laws.

The decision below will substantially affect neutral zoning laws throughout the nation. The decision bolsters Congress's attempt to substantially alter decades of free exercise and equal protection precedent, holding that Section (b)(1) of RLUIPA *per se* compels local governments to allow houses of worship to locate anywhere any group of persons is permitted to gather, without regard to government justification and contrary to the historical deference accorded to local government zoning decisions. Certiorari should be granted to resolve the important question of the scope of Congress's power to enact RLUIPA and the circuit court's imposition of an unprecedented strict liability standard on local governments for "equal terms" violations.

A. RLUIPA substantively alters established equal protection laws and is unconstitutional.

For RLUIPA to be constitutional, it must codify existing constitutional principles without substantively altering them. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In equal protection challenges to zoning laws, this Court has held that a court must find that the land uses being compared be "similarly situated" with each other in all relevant aspects, and if they are, and are being treated differently, then there must be a rational basis supporting the differing treatment.

See Cleburne, 473 U.S. at 439, 447-50. Where religious uses are involved, only zoning laws that are not "neutral and of general applicability" need to be justified by a compelling governmental interest. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531 (1993). A zoning law is not "neutral" or "generally applicable" if its purpose is to infringe upon or restrict practices because of their religious motivation, or if the government decides that its interests it seeks to advance are "worthy of being pursued only against conduct with a religious motivation." *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-879 (1990); *Lukumi*, 508 U.S. at 542-43.[1] Pre-*Midrash*, an incidental effect had never been synonymous with "purpose to infringe," and a restriction of location or preference was never equated with a restriction on religious practice. *See, e.g., American Communications Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 397-98 (1950) (noting the dismissal for lack of substantiality *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Porterville*, 338 U.S. 805 (1949), in which a church group contended that its First Amendment rights were violated by a municipal zoning ordinance preventing the building of churches in certain residential areas).

The decision below recognized that RLUIPA abrogates the "similarly-situated" and "rational basis" analyses under *Cleburne* and *Smith*. The court interpreted section (b)(1) of RLUIPA as requiring only an analysis of whether two land uses fall into the "natural perimeter" of "an assembly or institution," not whether the two land uses are similar to each other in all relevant zoning aspects. If the religious and non-

1. The district court found that the synagogues presented no evidence that the ordinances were enacted with any *Lukumi* animus or a purpose hostile to religion. App. H-112a; I-141a-145a.

religious assemblies are being treated differently, the circuit court held that that alone established the "targeting" of religion and discrimination sufficient to trigger the heightened standard under *Lukumi*. The decision below goes beyond *Lukumi*'s compelling interest exemption by allowing no exceptions and imposing a *per se* rule.

The decision's standard for establishing "similarly-situated" uses under RLUIPA does not take into account the myriad differences in assemblies and institutions that affect zoning decisions (*e.g.*, commercial vs. non-commercial uses, public vs. private uses). Under the decision's expansive definition of "assembly," religious institutions are similarly situated to every land use where people may gather (including nightclubs, restaurants, sports stadiums, arenas, parks, and bars, or informal gatherings such as Girl Scout meetings, tupperware parties and poker games in private homes). That view is unprecedented and unwarranted and presents an important question. If Congress established an equal protection test different than that prescribed by the Court, it would be beyond the scope of Congress' authority. *See City of Boerne*, 521 U.S. at 524 ("The power to interpret the Constitution in a case or controversy remains in the Judiciary").

B. Congress lacked the power to enact RLUIPA.

RLUIPA as interpreted and applied below, constitutes a gross legislative usurpation of the judicial function to decide whether there has been violation of constitutional rights, and a denigration of the uniquely local government function of land use planning. As the Court has stated, "zoning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local

legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508, n.18 (1975). *See also Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *FERC v. Mississippi*, 456 U.S. 742, 768, n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity").

Congress's power to intrude into this distinctly local function must be based on either section 5 of the Fourteenth Amendment or the Commerce Clause. There is no adequate legislative record that supports the notion that local land use and zoning laws, which, like here, permit religious institutions to be constructed and operate, interfere with interstate commerce, or that in this case there is any substantial burden affecting interstate commerce. Therefore the only *raison d'etre* for RLUIPA is section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce by appropriate legislation, the provisions of this article."

This Court has already found that a prior attempt by Congress to enact the similar Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"), was unconstitutional. *See City of Boerne*, 521 U.S. at 535. The Court's criticism of RFRA applies with the same force to RLUIPA:

> This is a considerable congressional intrusion into the State's traditional prerogatives and general authority to regulate for the health and welfare of their citizens. The substantial costs RFRA exacts, both in terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional

> conduct under the Free Exercise clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

Id. at 534-35. The Court found that RFRA contradicted "vital principles necessary to maintain separation of powers and the federal balance," and declared it to be unconstitutional. *Id.* at 536.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), adds force to the argument that RLUIPA is unconstitutional. The question in *Garrett* was whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the Americans with Disabilities Act of 1990. The Court wrote:

> *City of Boerne* also confirmed, however, the long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. 521 U.S., at 519-524, 117 S. Ct. 2157. Accordingly, § 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520, 117 S. Ct. 2157.

Garrett, 531 U.S. at 365.

In striking RFRA, the Court held that "that the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only 'anecdotal evidence' that, standing alone, did not reveal a "widespread pattern of religious discrimination in this country. . . ." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82 (2000), *citing City of Boerne*, 521 U.S. 507, 531. It also "found that RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*

RLUIPA, like RFRA, is not remedial, preventive legislation. RLUIPA suffers from the same lack of widespread evidence of discrimination in the zoning context. Despite Congress' self-serving statement that "the General Rules in § 2(a)(1), and the specific provisions in § (2)(b), are proportionate and congruent responses to the problems documented in this factual record," *see* 146 Cong. Rec. S7774-01, S7775, that "factual record" does not carry the weight demanded by this Court.

The anecdotal record made at the nine congressional hearings does not illustrate constitutional violations or "widespread and persisting" constitutional violations

by the states.[2] A 1998 national study of congregations by independent sociologists that was cited at the hearings – and which is the only nationwide and comprehensive survey of congregations ever done — found no pattern of discrimination against religious institutions by local governments, and showed that religious landowners rarely had to litigate in the land use process. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 344 (2003). The study showed that only one percent of religious institutions seeking a permit or license were denied. *Id.* at 351.

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2. The testimony has been described as falling into five categories: (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) multiple references to garden variety zoning laws applied to churches; and (5) private, rather than governmental, expression that does not implicate constitutional violations. *See* Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 344 (2003). Professor Hamilton noted that,

> the House Report attempts to meet its burden through an adjective, summarizing this evidence as 'massive,' but it is not even close to significant on the question of whether local and state governments persistently violate constitutional principles in the application of the thousands of land use laws routinely applied to millions of citizens, including religious landowners, every year.

Id. Indeed, no land use expert was asked to testify at the hearings to explain the potential impact of RLUIPA in the field. None of the local and state government organizations were asked to testify, despite their significant and vehement opposition to RLUIPA. *Id.* at 331.

Whether RLUIPA is legislation "broader than is appropriate if the goal is to prevent and remedy constitutional violations," *City of Boerne*, 521 U.S. at 532, is an important question that should be answered by this Court. In *Boerne*, the Court said:

> It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

Id. at 535. Location has never been a basis for according religious preferences. *See, e.g., Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakeland*, 699 F.2d 303, 307 (9th Cir. 1983) ("building and owning a church is a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs"); *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 825 (10th Cir. 1988) (holding that constructing a church in a district not zoned for such use is not intimately related to the religious tenets of the church); *International Church of the Foursquare Gospel v. City of Chicago Heights*, 955 F. Supp. 878, 880 (N.D. Ill. 1996) ("the impact [on zoning houses of worship] is not upon the content of religious practices but only upon where that religion may be practiced"). *See also Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 766 (7th Cir. 2003).

The Tenth Amendment protects the Framers' commitment to dual sovereignty. *See Printz v. United States*, 521 U.S. 898, 918-19 (1997); *New York v. United States*, 505 U.S. 144, 162 (1992) ("the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"). Whether Congress' attempt to go beyond the Constitution — to commandeer local governments to surrender their land use laws to a federal statutory standard — violates the Tenth Amendment is a question for this Court. *See Boerne*, 521 U.S. at 519 ("Legislation which alters the Free Exercise Clause's meaning cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is").

C. RLUIPA violates the Establishment Clause.

RLUIPA may also violate the Establishment Cause. Because there is a potential for an "assembly" of people in every zoning district, religious institutions could dictate where they may locate by merely pointing to any group of people who may gather in that location, effectively immunizing themselves from zoning altogether. RLUIPA's special deference to religious land uses provides "a federal statutory entitlement to an exemption from a generally applicable, neutral civil law," giving religious organizations "a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring), *citing Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

RLUIPA's "equal terms" provision makes no pretense about its preference for, and deference to, religion. A large

religious edifice could demand entry into a carefully zoned area simply because a small ballet school, club, or similar nonreligious assembly or institution lawfully operates within the zoned district. In a one-square-mile town like Surfside, with a small two-block business district, the presence of a single business district café would require that a town allow the balance of its commercial district to be used — if not consumed — by religious assemblies or institutions upon their demand. *Compare Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 ("At some point, accommodation may devolve into an unlawful fostering of religion. . . .").

D. The view that a plaintiff can prove an "equal terms" violation without proving a substantial burden is contrary to the express provisions of RLUIPA and free exercise law.

The court below held that a plaintiff need not prove a substantial burden on religious exercise to establish an "equal terms" violation under Section (b)(1) of RLUIPA. That contravenes the express terms of RLUIPA and its legislative history. As set forth in the "General rule" of Section (a) of RLUIPA, before a violation can be found, religious institutions must prove that a zoning law substantially burdens religious exercise. *See* 42 U.S.C.A. § 2000cc-1(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person. . . ."). As Congress explained, "This so-called jurisdictional element *must be proved in each case* as an element of the cause of action." H.R. Rep. No. 106-219, at 28 (emphasis added). *See also* 146 Cong. Rec *S7776 ("Sections [(b)(1) and (2)] . . . enforce the Free Exercise Clause rule against laws that burden

religion and are not neutral and generally applicable"); *id.* at *S7776 ("[T]he party asserting a violation of this Act shall *in all cases* bear the burden of proof that the government action in question constitutes a substantial burden on religious exercise") (emphasis added); *id.* at *S7775-76 (Section (a) is a "general rule" followed by "specific provisions").

Applying the statutory construction principle to read statutes as a whole, Section (a)'s threshold jurisdictional requirement for a Section (b)(1) violation makes sense because general provisions of RLUIPA suggest that the substantial burden requirement applies to any violation under the entire chapter. For example, RLUIPA's "Burden of Persuasion" applies to "violation[s] of section 2000cc of this title" (which includes both Sections (a) and (b)), and states "that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion." 42 U.S.C.A. § 2000cc-2(b). RLUIPA's preemptive force provision, "Governmental discretion in alleviating burdens on religious exercise," also applies to "any provision of this chapter" and provides that the government may avoid the preemptive force by changing the policy or practice that substantially burdens religious exercise. 42 U.S.C.A. § 2000cc-3(e).

A violation of Section (b)(1)'s "equal terms" provision naturally and expressly falls under Section (a)'s prohibition of substantially burdening religious exercise. The lower court's refusal to impose that threshold requirement broadens RLUIPA to protect religious institutions which would have no cause of action because they were not substantially burdened, thus taking RLUIPA beyond that which is necessary

to remedy purported constitutional violations. *See City of Boerne*, 521 U.S. at 520. This Court should determine whether the circuit court's decision to discard RLUIPA's substantial burden element was correct.

II. Conflict Between the Sixth and Eleventh Circuits on the Constitutionality of RLUIPA Warrants *Certiorari* Review by this Court.

A petition for writ of *certiorari* is pending seeking review of *Cutter v. Wilkinson*, 349 F.3d 257 (6th Cir. 2003) (Case No. 03-9877), relating to the enforceability of RLUIPA and its provisions applicable to institutionalized persons. *See* 42 U.S.C. § 2000cc-1. Although the instant case relates to RLUIPA's land use provisions, the land use and the institutionalized persons provisions are rooted in the same premise — to negate the effect of *Smith* and *City of Boerne*, and to reinstate the compelling interest test even as to neutral laws of general applicability.

In *Cutter*, the prisoners claim that Ohio prison regulations denying them access to religious literature and the opportunity to conduct religious services violates RLUIPA. The *Cutter* court held RLUIPA violated the Establishment Clause and was an improper exercise of Congress's legislative authority under the Commerce Clause and § 5 of the Fourteenth Amendment. 349 F.3d at 267 ("[R]LUIPA extends protection to religious exercise . . . far beyond what is required by the Establishment Clause; it imposes strict scrutiny where the Establishment Clause requires only a rational-relationship review."). The Eleventh Circuit came to a contrary conclusion. *Certiorari* should be granted to resolve the conflict.[3]

3. We note that *Bass v. Madison*, No. 03-1404, is pending seeking review of the Fourth Circuit decision in *Madison v. Riter*, 355 F.3d 310 (4th Cir. 2003), which also conflicts with *Cutter*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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